

No. 13,701

IN THE

**United States Court of Appeals
For the Ninth Circuit**

UNITED STATES OF AMERICA,	}
Appellant,	
vs.	
GEORGE WILLIAM PICKARD AND	}
WILLIAM HERSHEL CAGLE,	
Appellees.	

BRIEF OF APPELLEES

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QUESTIONS INVOLVED

We believe that in addition to the questions presented in appellant's opening brief the following questions are also in issue herein, namely:

Was the lack of any affidavit or verification of either the information filed or by criminal complaint under oath in view of appellees' motion to dismiss of sufficient grounds to warrant the Court's dismissal of the action?

Did the Court err in granting appellees' motion to dismiss?

The Fourth Amendment to the United States Constitution provides as follows:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, **but upon probable cause, supported by Oath or affirmation**, and particularly describing the place to be searched, and the persons or things to be seized.

ARGUMENT

A person cannot be prosecuted by information in Federal Courts unless the information is verified or unless a verified complaint is filed as basis for such prosecution.

U. S. vs. Smith (C. C.) 40 Fed. 755 (1899)

U. S. vs. Tureaud (C. C.) 20 Fed. 621 (1884)

State vs. Polite, 35 Fed. 58 (1888)

Johnson vs. U. S. 87 Fed. 187, 30 C. C. A. 612 (1898)

U. S. vs. Baumert (D. C.) 179 Fed. 735 (1910)

U. S. vs. Morgan 222 U. S. 274, 282, 32 Sup. Ct. 81, 82 (56 L. Ed. 198 (1911))

Fosters Federal Practice (5th Ed.) Sec. 494, Page 1659

Most States follow such rule:

Lustig vs. People, 18 Colo. 217, 32 Pac. 275

State vs. Gleason, 32 Kan. 245, 4 Pac. 363

Myers vs. People, 67 Ill. 503

Eichenlaub vs. State, 36 Ohio St. 140

DeGraffe vs. State, 2 Okla. Cr. 519, 103 Pac. 538

Thornberry vs. State, 3 Tex. App. 36

State vs. Bailter, 5 Wyo. 236, 39 Pac. 883
11328 Nevada Compiled Laws 1929

We believe the case of Weeks v U. S. 216 Fed. Rep. 292, cited by appellant at page 4, opening brief is distinguishable from the instant case in that a plea was entered by the defendant, the case tried and a conviction obtained, whereas in the instant case the action was dismissed upon motion of appellees and no plea entered nor did appellees submit themselves to the Court's jurisdiction.

The cases of Creekmore v U. S. 237 F. 743, 150 CCA 497, L.R.A. 1917C 845 and Kelly v U. S. 250 Fed. Rep. 947 cited on page 49 appellant's brief may be distinguished from instant case in that affidavits accompanied the information in both cases; in the instant case no affidavit of any kind was filed either by way of complaint or in support of the information. The cases are therefore not controlling in the instant case.

The case of Yaffee v U. S. 276 F. 497, cited in page 5 appellant's brief is likewise not in point as an affidavit was filed with the information therein.

The lower Court correctly held in the instant case that appellees were entitled to be proceeded against in accordance with rules 3, 4 and 5 of the Federal Rules of Criminal Procedure and the filing of the information without such preliminary procedure, in view of the motion to dismiss because of such failure, that appellees were entitled to have the information quashed and the action dismissed.

Pertinent parts of rules 3, 4 and 5 provide as follows:

Rule 3. The complaint. — The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States.

Rule 4. Warrant or summons upon complaint. —
(a) Issuance. If it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the government a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue.

Rule 5. Proceedings before the commissioner. —
(a) Appearance before the commissioner. — An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

(b) Statement by the commissioner. — The commissioner shall inform the defendant of the com-

plaint against him, of his rights to retain counsel and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules.

(c) Preliminary examination. — The defendant shall not be called upon to plead. If the defendant waives preliminary examination, the commissioner shall forthwith hold him to answer in the district court. If the defendant does not waive examination, the commissioner shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If from the evidence it appears to the commissioner that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the commissioner shall forthwith hold him to answer in the district court; otherwise the commissioner shall discharge him. The commissioner shall admit the defendant to bail as provided in these rules. After concluding the proceeding the commissioner shall transmit forthwith to the clerk of the district court all papers in the proceeding and any bail taken by him.

In the case of *U. S. v Wuersele* 13 Fed. (2nd) 952, the Court at page 953 said:

"Defendant should have been taken before the commissioner. Chapter 301, sec. 1, of the Act of August 18, 1894 Comp. St. 1678. He should have been taken before the commissioner at Dunkirk, and he was entitled to a hearing before such commissioner; and, moreover, defendant had the right to examine the person upon whose affidavit the search warrant was issued."

In the case of *U. S. v Reilley*, 20 Fed. 46, Circuit Court, d. NEVADA, the Court at page 46 said:

"Generally, in this circuit, unless for some substantial reason the court otherwise determines, it has been required that the party charged shall be examined and held to answer by some committing Magistrate, or else that evidence showing probable cause should be made to appear in some proper form before granting leave. In this case the information was verified by the direct, positive affidavit of the United States Attorney, and, upon being arrested upon a warrant issued thereon, the prisoner was examined and held to answer for the offense set out in the information."

Pertinent parts of Rule 7, Federal Rules of Criminal Procedure provides as follows:

Rule 7. The indictment and the information. —
 (a) Use of indictment or information. — An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted

by indictment or by information. An information may be filed without leave of court.

Rule 7 did not change the rules requiring verification of some kind as basis for filing information and the courts retain the same rights they had prior to such amendment to require proper safeguards as basis for filing information with the exception that the information may now be dismissed rather than refusal to grant leave to file information which was practice before new rules in accordance with foregoing authorities.

CONCLUSION

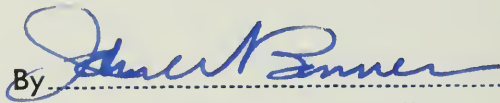
We respectfully contend that rules 3, 4 and 5 provide a procedure available to any accused person where no indictment has been returned; otherwise the elementary principle as set forth in the Fourth Amendment to United States Constitution requiring a showing of probable cause as a prerequisite to any prosecution would be ignored and given no legal effect; we further contend the law of the State of Nevada and most all States prohibit the institution of a criminal proceeding for any type of offense under circumstances similar to those of this case; said rules 3, 4 and 5 offer fundamental safeguards to individual liberty to which any accused person is entitled, especially when proper and timely objection is made

and such rights are not waived which is the situation in this case. The lower Court properly dismissed the action. (Emphasis added where in bold type.)

Respectfully submitted,

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